

SEP 8 1944  
CHARLES HENRY COOPER

---

# Supreme Court of the United States

OCTOBER TERM 1944

---

No. 335

---

HATTIE MAE TILLER, EXECUTOR OF THE  
ESTATE OF JOHN LEWIS TILLER, DECEASED

*Petitioner,*

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY

*Respondent.*

---

BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR FOURTH CIRCUIT.

---

THOMAS W. DAVIS,  
Wilmington, N. C.

J. M. TOWNSEND,  
Petersburg, Virginia

COLLINS DENNY, JR.,  
Richmond, Virginia

CHARLES S. VALENTINE,  
Richmond, Virginia

*Attorneys for defendant,*

ATLANTIC COAST LINE RAILROAD COMPANY

---

## INDEX

### SUBJECT INDEX

	<i>Page</i>
OPINIONS BELOW . . . . .	1
QUESTIONS INVOLVED . . . . .	1
STATEMENT OF THE CASE . . . . .	3
ARGUMENT . . . . .	11
SUMMARY OF ARGUMENT . . . . .	11
I. The questions now submitted are not of such Gravity and Importance as to Warrant the Granting of the Writ . . . . .	11
II. There was no evidence of a Causal Connection Between a Violation, if any, of the Boiler Inspection Act and the Death of Tiller . . . . .	13
III. This Petition and Record <del>does not</del> Present the Question whether a Railroad Practice can Nullify a Rule of the Interstate Commerce Commission . . . . .	16
IV. There was no Evidence Tending to Establish a Duty on Defendant to give Special Warning to Tiller of the Back-up Movement on Slow-Siding . . . . .	18
V. A general Verdict Cannot be Sustained if one or more of Several have Erroneously been Submitted to the Jury . . . . .	20
CONCLUSION . . . . .	25

# INDEX—Continued

## TABLE OF CASES CITED

	<i>Page</i>
<i>American Construction Co. v. Jacksonville, etc. R. Co.</i> , 148 U. S. 372, 37 L. Ed. 486, 13 S. Ct. 758 . . . . .	13
<i>Atchison, etc. R. Co. v. Toops</i> , 281 U. S. 351, 74 L. Ed. 602, 50 S. Ct. 281 . . . . .	16
<i>A. C. L. v. Powe</i> , 283 U. S. 401, 75 L. Ed. 1142, 51 S. Ct. 498 . . . . .	24
<i>Brady v. Southern R. Co.</i> , 88 L. Ed. . . . .	16
<i>Buckeye Cotton Oil Co. v. Sloan</i> , (6th Cir.) 250 F. 712, 722 . . . . .	21
<i>C. &amp; O. R. Co. v. Mihas</i> , 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42 . . . . .	18
<i>C. &amp; O. R. R. Co. v. Nixon</i> , 271 U. S. 218, 70 L. Ed. 915, 46 S. Ct. 495 . . . . .	20
<i>Chicago M. &amp; St. P. R. Co. v. Coogan</i> , 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564 . . . . .	16
<i>Chicago Rys. Co. v. Kramer</i> , 234 F. 245, 250 . . . . .	22
<i>Chicago St. P. M. &amp; O. Ry. Co. v. Kroloff</i> , 217 F. 525, 528 . . . . .	21
<i>Christian v. Boston</i> , (2d. Cir.) 109 F. (2d.) 103, 105 . . . . .	21
<i>Craig-Giles I. Co. v. Wickline</i> , 126 Va. 223, 237, 101 S. E. 225 . . . . .	23
<i>Cross v. Ryan</i> , (7th Cir.) 124 F. (2d.) 883 . . . . .	24
<i>Erie R. Co. v. Gallagher</i> , (2nd. Cir.) 255 F. 814, 817 . . . . .	21
<i>Fernand v. Boston &amp; M. R. Co.</i> , 62 F. (2d.) 782 . . . . .	18
<i>Fields v. U. S.</i> , 205 U. S. 292, 51 L. Ed. 807, 27 S. Ct. 543 . . . . .	13
<i>Hamilton Brown Shoe Co. v. Wolf</i> , 240 U. S. 251, 60 L. Ed. 629, 36 S. Ct. 269 . . . . .	13, 24
<i>Houston Oil Co. v. Goodrich</i> , 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140 . . . . .	13
<i>Lang v. N. Y. Cent. R. Co.</i> , 225 U. S. 455, 65 L. Ed. 729, 41 S. Ct. 381 . . . . .	16

# INDEX—Continued

	<i>Page</i>
<i>Miller v. Advance Transp. Co.</i> , (7th Cir.) 126 F. (2d.) 442 . . . . .	24
<i>Pennsylvania R. Co. v. Chamberlain</i> , 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391 . . . . .	16
<i>Scott v. Parlin, et al.</i> , 245 Ill. 460, 92 N. E. 318 . . . .	21
<i>Southern Pac. Co. v. Kauffman</i> , 50 F. (2d.) 159, 164 . .	22
<i>Stephenson v. Grand Trunk Western R. Co.</i> , (7th Cir.) 110 F. (2d.) 401 . . . . .	23
<i>James Stewart &amp; Co. v. Newby</i> , (4th Cir.) 266 F. 287, 291	21
<i>Tennant v. Peoria, etc. R. Co.</i> , 321 U. S. 29, 88 L. Ed. 322	16
<i>Tiller v. A. C. L. R. Co.</i> , 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967 . . . . .	12
<i>Travelers Insurance Co. v. Wilkes</i> , (5th Cir.) 76 F. (2d.) 701, 705 . . . . .	21
<i>Wilmington Star Mining Co. v. Fulton</i> , 205 U. S. 60, 51 L. Ed. 708, 27 S. Ct. 412 . . . . .	20, 21, 22
<i>Woods, In re</i> : 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417	13

## STATUTES CITED

	<i>Page</i>
Boiler Inspection Act, 45 U. S. C. A., Sect. 22 et seq. . .	2
Relief of Supreme Court, Acts for . . . . .	13

# **Supreme Court of the United States**

OCTOBER TERM 1944

---

No. 335

---

HATTIE MAE TILLER, EXECUTOR OF THE  
ESTATE OF JOHN LEWIS TILLER, DECEASED  
*Petitioner,*

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY  
*Respondent.*

---

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR FOURTH CIRCUIT.**

---

## **OPINIONS BELOW**

The District Court handed down no written opinion. Its order is found on pages 197-8 of the Record. The opinion of the Circuit Court of Appeals is reported 142 F. (2d) 718, and is found on pages 200 et seq. thereof. Its judgment is found on page 208.

## **QUESTIONS INVOLVED**

Defendant assigned a number of objections to the charge to the jury (R. 191 et seq.) and a number of grounds for its motion that the verdict be set aside, etc. (R. 195-6). Before

the Circuit Court of Appeals, it insisted on all of these, save the last three objections to the charge, which had been stricken by the District Court (R. 196-7).

The Circuit Court of Appeals found that it was not necessary to pass on some of these points; it concluded that others were not sound; and it reversed the case and remanded it for a new trial because of errors in two particulars, i.e.: (1) The question of an alleged violation of the Rules of the Interstate Commerce Commission promulgated under authority of the Boiler Inspection Act should not have been submitted to the jury, because there was no evidence tending to establish a causal connection between a violation, if any, and the injuries sustained by petitioner's decedent from which he shortly died; (2) There was no evidence tending to establish a duty on defendant to give to petitioner's decedent a special warning of the movement of the cars by which he was struck.

We understand that in opposing the issuance of a writ of certiorari, the only questions involved are those decided in defendant's favor. Accordingly, the questions involved at this stage of this proceeding are:

(1) Whether there was sufficient evidence of causal connection between a violation, if any, of Rule 131 of the Interstate Commerce Commission promulgated under authority of the Boiler Inspection Act (45 U. S. C. A., Sec. 22, et seq.) and the death of petitioner's decedent to justify submission of that question to the jury.

(2) Whether there was sufficient evidence of an unusual or unexpected movement or a departure from a general practice in moving the cars that struck petitioner's decedent to demand that special warning of the movement be given him.

(3) If such warning was required, whether as a matter of law, it was not given.

(4) If one or more of several issues is erroneously submitted to the jury, whether a general verdict can be sustained.

## STATEMENT OF THE CASE

In the second paragraph of Section B of the petition (p. 2), petitioner gives a factual statement which she says the Circuit Court of Appeals found warranted by the evidence. The whole of that statement, with the exception of the last sentence thereof, is a literal quotation from the opinion of the Circuit Court of Appeals (R. 201 line 21 through line 41) and in one minor particular an accurate summary of the finding of the Circuit Court found in the third paragraph on page 203 of the Record. The last sentence of petitioner's statement finds no justification either in the opinion of the Court below or in the evidence. But the Circuit Court of Appeals did not find the evidence on the second trial warranted the inference that the accident happened in the manner quoted. It expressly introduced that statement by stating:

"No one saw the accident but the evidence *at the first trial* warranted the inference that the accident occurred under the following circumstances:" (Italics supplied).

In speaking of the evidence at the second trial, it said:

"Since the evidence at the second trial *in respect to the movement of the cars* was substantially the same as at the first," etc. (Italics supplied).

The Circuit Court of Appeals did not find as stated by petitioner that the evidence *at the second trial* warranted the inference that,

"\* \* \* Tiller was standing between two of the tracks, while using a flashlight to examine the seals on the doors of the cars on the track to the east without observing that the cars in the back up movement were approaching him on the track to the west."

This misquotation of the Circuit Court and a failure properly to summarize other facts compels us to make a succinct statement.

We attach hereto a blue print of the pertinent portion of Clopton Yard showing the initial movement of the yard engine and of the road engine, which conforms to the evidence of every witness who testified concerning them.

Clopton Yard is the southern part of defendant's Richmond, Virginia, Yards (R. 140), several miles south of the Byrd Street Yard on the north Bank of James River (R. 24, 37, 122). Clopton Yard is not lighted (R. 31, 61, 99).

Classification of Richmond cars for the south is begun at Byrd Street Yard, and, if not there completed, is completed at Clopton Yard (R. 132, 135). The Richmond cars are carried each evening to Clopton by a yard engine and crew (R. 24, 37, 122). It is not unusual for final classification of these cars to be made at Clopton (R. 66). Also, each evening the road engine of the through freight known as "First 209" brings to Clopton cars from north of Richmond, which have been assembled north of the city in the Acca Yards of the R. F. & P. R. R. Co. (R. 23-24). When both of these cuts of cars reach Clopton, the through cars for the fast freight "First 209" are assembled or classified with Weldon cars immediately behind the engine, then Petersburg cars, and finally cars for Rocky Mount and beyond (R. 39). In classifying at Clopton, sometimes one set of tracks is used, sometimes another, as convenience and the particular classification to be made may determine; sometimes this requires more moves than are required on other occasions (R. 40, 43, 64, 78-79, 103, 107, etc.)

Sergeant Tiller had been a member of defendant's police force for sixteen years (R. 16). Policemen protect the trains and merchandise (R. 145, 147, 150) and in order more efficiently to guard against theft, they are cautioned against falling into a routine (147, 151), and they avoid riding the same place on trains (144, 146). They know that the operators do not know where they may be in a yard (29, 86);

that no special warning can be or is given them of the movement of trains (144, 147, 151); and that they must watch out for their own safety (144, 147).

For a number of years Tiller had been regularly assigned to this fast freight "First 209" (R. 145, 150, 164), and he was assigned to it on March 20, 1940. He followed no set practice in catching his train at any particular point,—sometimes he caught it at Acca, sometimes at Byrd Street, sometimes at Clopton (86, 141). On March 20, 1940, it is assumed he caught it at Byrd Street, for he was seen there shortly before the Byrd Street cut left that yard, and he was not seen again until after he was injured (R. 69, 185). In doing his work, he followed no routine (R. 86, 141, 147, 164, 178).

On the night in question, the road engine, as usual, came into Clopton on the old belt line tracks from Acca (R. 25). It brought with it three hopper cars (R. 26, 38, 124) for Petersburg, behind which were twelve cars for Rocky Mount or beyond (R. 124). The yard engine, operating in reverse and pulling its cars, brought fifty-three cars to Clopton from Byrd Street, using the track marked "south bound main line" (R. 69-70). Immediately north of the yard engine were fifteen local cars which were to go south later in the evening on the local freight; next was one Petersburg car; then a Rocky Mount car; then six Petersburg cars; and finally thirty Rocky Mount cars (R. 123).

A yardmaster of forty years experience was on duty that evening at Clopton (R. 122). When he reached the yard by automobile, bringing with him the consist of the cars which were to come from Byrd Street (which consist showed the above arrangement) (R. 124), the road engine had arrived (R. 125) and was standing on the old belt line, north of Clopton Road by the yard office, marked "A" on the blue print (25, 56, 125).

He directed the road crew to cut behind the three Petersburg hopper cars, to proceed south across Clopton Road and through the switch marked "B" on to "slow-siding," or track No. 1; then to back north on slow-siding, through

switch "B", sufficiently far to clear that switch so as to permit the yard engine to push its Rocky Mount car, which was between its Petersburg cars, up to Point A, and leave it attached to the twelve Rocky Mount cars left there by the road engine (R. 56, 68, 126).

As the road crew began this movement, the yard engine was coming into Clopton (R. 37, 70, 127). It stopped about 880 feet south of Clopton Road (127), so that its seventeenth car, i.e. the Rocky Mount car between the Petersburg cars, was approximately opposite the switch point "B", and so that Clopton Road was blocked by the cars behind it (37, 62).

The yardmaster directed the yard crew to cut behind this seventeenth car, proceed with the seventeen cars to which it was to hold, south of switch "C", then pushing north through switches "C" and "B", to place this seventeenth car with the twelve Rocky Mount cars left by the road engine at "A" (R. 76, 127).

Thereafter, the yard engine, with sixteen cars (the sixteenth being a Petersburg car) was to proceed south through B and C to the south bound main line, then north so as to attach this Petersburg car to the cut it had left on south bound main line. It was then to proceed south with its fifteen local cars to a storage track at the south end of the yard (R. 128).

Thus would the yard engine have completed the classification of "First 209", which would then be in three parts. The engine and three Petersburg hopper cars on slow siding north of switch "B"; seven Petersburg cars followed by thirty Rocky Mount cars on south bound main line north of switch "C", and thirteen Rocky Mount cars on the old belt line at "A".

As the yard engine backed out of the old belt line preparatory to placing the one Petersburg car with the cut it had left on south bound main line, the road engine with the three Petersburg hopper cars was to follow through "B" and "C"; then to back north on south bound main line to pick

up its cars, which the yard engine had classified. With these cars, it was to go south so as to clear switch "C", then go north through switches "C" and "B" to get the cars at "A", which the yard engine had classified for it. It was then to proceed on its journey (R. 129).

This plan was the most expeditious of the several possible plans, one was no safer than the other, and any possible plan would have required that at some point the road engine back, pushing ahead of it the three Petersburg hopper cars (R. 129-131, 138).

By petitioner's own witnesses, it was proved that the cut of cars from Byrd Street had stopped on south bound main line across Clopton Road, before the road engine begun to back pushing ahead of it the three Petersburg hopper cars on to slow-siding (R. 38, 62, 77-8). Accordingly, while this back-up movement into slow-siding was taking place, there was no movement taking place on south bound main line north of a point opposite switch "B".

The road engine carried no headlight on the rear of its tender (R. 31) of a kind required by Rule 131 of the Interstate Commerce Commission (R. 22) to be carried by "each locomotive used in yard service". The road engine of "First 209" was not "regularly required to run backward for any portion of its trip" (R. 64), and it was not equipped with a rear headlight of a kind required by Rule 129 (R. 21) of a locomotive "used in road service" which is "regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train or in making terminal movements". The ends of the hopper cars which the road engine pushed into slow-siding were materially higher than a headlight mounted on the tender would have been (R. 172-4). Hence, a headlight on the rear of the tender, as stated by the Circuit Court of Appeals, "would not have illuminated the area ahead of the cars". (R. 205).

As the road engine backed the three hopper cars into slow-siding, at a rate of four or five miles an hour, its bell was ringing (R. 28, 104). As the lead end of the lead car of

the back-up movement passed switch "B", a brakeman got on that lead end (R. 27, 58), so as to protect the highway crossing from traffic approaching from the west (R. 62, 64). He held in his hand a lighted lantern with which he signalled the engineer backward (R. 27, 58, 63), and he alighted about the middle of Clopton Road (R. 28, 58, 63). He then waited to see that the road engine cleared switch "B" (R. 58), and gave the stop signal (29, 58). When it stopped, the road engine was south of Clopton Road (R. 41).

Just after the road engine stopped, a beam of light was seen on the ground between slow-siding and south bound main line, a few feet north of Clopton Road (R. 30, 99). This was Tiller's flashlight. About a car length further north his cap was found, then another car length his pistol, broken or open or "unbreached", and caught between the brake shoe and wheel at the lead end of the lead hopper car, Tiller himself (R. 30-31).

There is nothing in this record which shows what Tiller was doing or at what point he was hit. In its opinion, when this case was formerly before it, the Supreme Court said:

"Tiller, using a flashlight for the purpose, was inspecting the seals of the train moving slowly on one track when suddenly he was hit and killed by the rear car of a train backing in the opposite direction on the other track."

This was virtually the statement made by the Circuit Court of Appeals in the first appeal to it. That Court on that occasion added:

"He was struck a short distance north of Clopton Road by the backup movement of the cars from Acca Station on the slow siding."

There was in the record on the first appeal, over the objection of defendant, an unexplained report made by the Superintendent of Transportation to the Virginia State Cor-

poration Commission, giving a purported account of the accident which tended to support these findings. Since on the first trial, the District Court sustained a motion for a directed verdict, there was no occasion for defendant to explain this report and to present the documentary evidence showing it to be a figment of the imagination of the clerk who prepared it.

This report was admitted, over objection, on the second trial. It was developed, however, that the report was prepared by a clerk in the Superintendent of Transportation's office, and that said Superintendent, who signed the report, knew nothing of the facts of the accident (R. 48-49).

The clerk who prepared the report had no personal knowledge of the matter (R. 153). He introduced his complete file containing all the data he had from which to make up the report (R. 159, 161). This data consisted of three letters or reports (R. 153-5, 155-6, 157-9). Each of these letters or reports makes it clear that no one knew what was the cause of the accident, how it occurred or what Tiller was doing when it occurred. Each gives the inference or assumption of the maker of the report, and each inference or assumption is different from the others. One says that "apparently" Tiller was standing on slow-siding watching cars being handled by the yard engine (R. 155); another says "the inference is" that Tiller stepped down from the Byrd Street cars into path of road engine (R. 156); and the third says "it is assumed" that Tiller stepped from Byrd Street cars and backed into cars handled by road engine (R. 159). The Circuit Court of Appeals accordingly said: "Thus explained, the report added little or nothing to the facts in evidence." (R. 206).

The Circuit Court of Appeals found substantial evidence to show that the road engine does not "usually" back cars into slow-siding; it also found that on other occasions this same move had been made, and that slow-siding was in general used and was used for back-up movements for other purposes.

Thirteen witnesses testified upon the question of the use of slow-siding. Two witnesses of limited experience in Clopton had never made this particular move, but said that one night one move was made, another another (R. 32, 43, 47, 107). One of very limited experience in Clopton had never seen this particular move made (R. 102). Two of limited experience had seen it made on other occasions (R. 60, 111-2). Three, who had had fairly extensive experience in Clopton, had seen it made on other occasions (R. 144-5, 146-7, 150). There were five witnesses of long and broad experience in Clopton. One became hopelessly confused on the meaning of the words "usual" and "unusual" (R. 79, 80, 82). He said that on a number of occasions he had seen the road engine back into slow-siding (R. 79). A second said the particular move made on the evening in question was not a usual move (R. 89), but that "many times" he had seen a road engine back into slow-siding for one purpose or another (R. 97). A third said he had never made the particular move (R. 114, 117), but that road engines often backed into slow-siding (R. 115, 116). The other two said the particular movement often took place (R. 131, 177). To these facts, there is to be added that virtually every witness testified that at one time or another every track in Clopton is used.

Every witness questioned on the subject testified that the road engine was not being "used in yard service" but was being "used in road service" when it made the back up movement into slow-siding (R. 40, 64, 79, 97, 104, 108, 117, 142). It is clear from this testimony that if a locomotive takes a car from one point in a yard, carries it to another and leaves it, then it is classifying or switching, and is being used in yard service. If, on the other hand, an engine moves "light", i. e. the engine and tender alone, or with one or more cars to which it holds, so as to get out of the way to permit another engine to switch a car, then the former engine is used in road service (see same references, and particularly R. 117-9).

The parties entered into a stipulation (R. 148-50) which sets forth that in practice, while some of the largest rail-

road yards of the country are lighted by overhead lights, "no yard of the size and character of Clopton" is so lighted; that when cars are pushed by a locomotive in a yard at night, no headlight or other light is placed on the lead end of the back-up movement; and a locomotive equipped with a headlight for road service, but not equipped for yard service, which brings cars into a yard, is permitted to make such movement as may be necessary or convenient to get the road engine and cars adjacent thereto out of the way, so that the yard engine may do the necessary classifying and switching work.

## ARGUMENT

### SUMMARY OF ARGUMENT

1. The questions now presented are not of such gravity and importance as to warrant the granting of the writ.
2. The Circuit Court of Appeals correctly found that there was no evidence tending to show that a violation, if any, of the Boiler Inspection Act was a proximate cause of the death of petitioner's decedent.
3. The petition and record do not present the question whether a railroad practice can nullify a rule of the Interstate Commerce Commission.
4. The Circuit Court of Appeals correctly found that there was no evidence tending to establish a duty on defendant to give special warning to petitioner's decedent.
5. A general verdict cannot be sustained if one or more of several issues has erroneously been submitted to the jury.

#### I.

**The Questions now Submitted are not of such Gravity and Importance as to Warrant the Granting of the Writ.**

Only three questions are submitted by the petition and record: (1) Was there evidence of causal connection be-

tween a violation, if any, of the Boiler Inspection Act and the death of Tiller? (2) Was there evidence of a duty on defendant to give special warning to Tiller that a back-up movement was about to be made into slow-siding? (3) Is a general verdict good when one or more matters have been erroneously submitted to the jury?

The first two of these questions are factual. Concerning them, there is no contention that the Circuit Court of Appeals failed to recognize and understand controlling legal principles. The only contention is that it failed properly to apply recognized principles to the specific facts of this case. The third is a legal question. Petitioner, in her attempt to bring herself within the rule of practice of this Court that a writ will be allowed if a legal question of importance is the subject of conflicting decisions, says: "there is decided conflict of authority upon the question as to whether error affecting only one of two or more issues is prejudicial" (p. 12). If there be "decided conflict" astute counsel would certainly have cited the cases. At the proper point in this brief, we shall show that there is no conflict on this point.

In the opinion of this Court, when this case was formerly before it, it said: "We granted certiorari because of the important question involved in the Circuit Court of Appeals' interpretation of the scope and effect of the 1939 amendment to the Federal Employers' Liability Act". *Tiller v. A. C. L. R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967. The instant petition presents no question of general importance; it presents no question of law concerning which there is conflict between lower appellate courts; it presents only the question whether recognized legal principles were correctly applied to the specific facts of this case. While there is no question of the power of this Court to grant certiorari in such a situation, it is well recognized that the Court cannot attain the great end and aim for which it was created, if in all cases in which it perhaps might differ from the lower Appellate Courts, it is to review the facts to determine whether there is evidence

to take a particular point to the jury. If in such cases certiorari is to be granted, the sound purpose of the Acts of Congress for the relief of this Court (Act of Mar. 3, 1891, 26 Stat. 826, c. 517; Act of Jan. 28, 1915, 38 Stat. 803, c. 22, 38, U. S. C. A. 211; Act of Sept. 6, 1916, 39 Stat. 726, Sect. 3, c. 448; Act of Feby. 13, 1925, 43 Stat. 936, c. 229) will be defeated. Accordingly, this Court has not allowed the writ under such circumstances. Years ago Chief Justice Fuller, in writing the Court's opinion denying a writ of certiorari in the case of *In re Woods*, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417, said:

"But we do not regard the inquiry \* \* \* whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

See also *American Construction Co. v. Jacksonville, etc. R. Co.* 148 U. S. 372, 37 L. Ed. 486, 13 S. Ct. 758; *Fields v. U. S.*, 205 U. S. 292, 51 L. Ed. 807, 27 S. Ct. 543; *Hamilton-Brown Shoe Co. v. Wolf*, 240 U. S. 251, 60 L. Ed. 629, 36 S. Ct. 269; *Houston Oil Co. v. Goodrich*, 245 U. S. 440, 62 L. Ed. 385, 38 S. Ct. 140.

Furthermore, the judgment for which review is now sought is not final. The case has been remanded for a new trial, and as this Court said in *Hamilton-Brown Shoe Co., v. Wolf*, *supra*: "Except in extraordinary cases, the writ is not issued until final decree." See also, *American Construction Co. v. Jacksonville, etc., R. Co.*, *supra*.

## II.

**There Was No Evidence of a Causal Connection Between a Violation, if any, of the Boiler Inspection Act and the Death of Tiller.**

The Circuit Court of Appeals passed over the question whether there was any substantial evidence of a violation

of the Boiler Inspection Act. For the purposes of its decision it said "we shall assume" the road engine was being used in yard service (R. 204). This assumption was contrary to every line of testimony on the matter. Every witness who testified categorically pointed out that the movement of the road engine was a movement in road service, and the Circuit Court of Appeals might well have disposed of the Boiler Inspection Act phase of the case by finding that there was no evidence of a violation. Instead of so doing, it made the assumption above mentioned, proceeded to inquire whether there was any evidence of causal connection between the assumed violation and the death of Tiller, and found that there was no evidence of such a connection.

It is not disputed that the road engine pushed ahead of it three large hopper cars, the ends of each of which extended in height to a point substantially above that which would have been attained by the top of a headlight, had a headlight been mounted on the rear of the tender of the road engine. It is, accordingly, self-evident that had there been such a rear headlight, its beams would not have been projected up the track. They would rather have been shot against the solid end of a car and the only light afforded thereby would have been such illumination as would have been diffused out to the sides and upward.

Petitioner argues that Tiller might have seen this diffused light, and, had he seen it, that he might have avoided injury. The answer is very simple. If Tiller was standing on slow-siding, or between slow-siding and south bound main line, and if he was facing so that he could have seen this diffused illumination, he could not have failed to see, on the dark night in question, the lantern which the brakeman riding the lead end of the backup movement was waving as he signalled his engineer backward.

There is, as we have pointed out, no evidence tending to show where Tiller was, or what he was doing when he was struck. It cannot even be assumed that he was struck just north of Clopton Road at the point where his flashlight was

found. If, when he was struck, he had his flashlight in his hand, it is reasonable to suppose that he immediately dropped it. But there is no evidence that he had the flashlight in his hand. There were four men who were in position to see the beams of the flashlight, if Tiller had been holding it while lighted. No one of them saw any sign thereof (R. 63, 77-8, 103, 176-7). If, when Tiller was struck, the flashlight was in his pocket, he may well have been dragged some distance before it fell out, just as he was dragged some distance before his cap fell from his head and before his pistol fell. His pistol was found open or broken, and beyond question the fall of the pistol operated to open it. No conclusion that Tiller held a lighted flashlight can be drawn from the fact that, when found, it was lighted, for just as the fall of the pistol opened it, so the fall of the flashlight may have operated to connect the electric circuit. Indeed, all we know is that when he was struck, Tiller was some place between switch point "B" and a point three or four feet north of Clopton Road.

Since we do not know what Tiller was doing when he was struck, it is perfectly possible that he was aware of the back-up movement and slipped or fell underneath or against it. The evidence shows that on the night in question he had on an unusual amount of clothing (R. 143). It is perfectly possible that having waited until the cars from Byrd Street had stopped, Tiller jumped out of one of those cars under the back-up movement. He was to guard against theft, look out for tramps, etc. It is perfectly possible that as the back-up movement was slowly taking place, he attempted to mount the ladder on the eastern side of the lead end of the back-up movement to see whether anyone was in that hopper car, and that in doing so he slipped. Before it can be said that a failure to furnish the diffused illumination above mentioned was a proximate cause of the injury and death of Tiller, it is necessary that we know where Tiller was and what he was doing, and those questions are left completely unanswered by this record. In its former opinion in this

case, this Court pointed out that a plaintiff must prove the negligence of the defendant. It is equally well settled that causal connection must be proved and that a jury is no more permitted to speculate concerning the cause of an accident than to speculate concerning the existence of negligence. *Chicago M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; *Atchison, etc. R. Co., v. Toops*, 281 U. S. 351, 74 L. Ed. 602, 50 S. Ct. 281; *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391; *Brady v. Southern R. Co.*, 88 L. Ed.; *Tennant v. Peoria, etc. R. Co.*, 321 U. S. 29, 88 L. Ed. 322. And it is equally well settled that a violation of a Safety Appliance Act creates no right of action unless it is the proximate cause of an injury. *Lang v. N. Y. Cent. R. Co.*, 225 U. S. 455, 65 L. Ed. 729, 41 S. Ct. 381.

### III.

#### **The Petition and Record Does not Present The Question Whether a Railroad Practice Can Nullify a Rule of the Interstate Commerce Commission.**

In her petition, petitioner says that this question is presented (p. 5). We assert that this question is not presented. We have never contended and do not propose by action of petitioner to be placed in the position of contending that a valid rule of the Interstate Commerce Commission can be abrogated by a practice of the railroad, and the Circuit Court of Appeals did not hold that a rule of said Commission could be nullified by railroad practice.

The petitioner argued below and argues here that Rule 131 not only requires that a locomotive used in yard service be equipped with a rear headlight, but also that it forbids such locomotive to push cars ahead of it so as to obscure the headlight. The Circuit Court of Appeals held that the petitioner's interpretation of the Rule was not sound, and it specifically held "that no rule forbids" a railroad from permitting a locomotive used in yard service to push cars ahead of it when such cars obscure the headlight. That this

is an accurate construction of the rule, cannot be questioned. This evidence shows, and indeed the Court might take judicial knowledge of the fact that in the railroad yards of this country locomotives push cars ahead of them as frequently as they pull cars behind them. The Rules of the I. C. C. promulgated under the Boiler Inspection Act have been in effect for more than thirty years. Inspectors of the Commission are constantly in and out of railroad yards, yet no one has ever contended that this uniform practice of the roads is violative of Rule 131. Acquiescence by the Commission through all these years in this practice is as strong a practical construction by the Commission of its Rule as could be had, and is as clear a construction as if the Commission had specifically passed upon the question.

There is another conclusive answer to this extreme contention of petitioner. Probably every yard in the country, certainly most of them, have many deadend tracks. If, during the night time, a locomotive may not push a car, no car could be stored on any one of those tracks unless the locomotive which pulled it into the track, were likewise to remain on that track until daylight. If petitioner's construction of the Rule be correct, cars could not be classified at night because it would be impossible to push one car up to another for coupling purposes. If her construction be correct, work in yards all over the country must cease with night and can be resumed only at dawn.

Finally, petitioner overlooks the fact that the Boiler Inspection Act authorizes the Commission to make rules and regulations concerning the condition and appliances of locomotives and tenders only. It is not necessary to inquire whether some other legislation would authorize the Commission effectively to prohibit work in classification yards during the night time. Certainly the Boiler Inspection Act gives to the Commission no authority to prescribe rules concerning the uniform classification practices of railroads, and the Commission under the authority of that Act has not attempted so to do.

We cannot pass over in silence the totally improper argument of petitioner found at the top of page 17 of her brief, wherein she sees fit to refer to an *ex parte* report of the Commission concerning the accident reports of this defendant and some other railroads. She and her attorneys cannot think that this *ex parte* report of the Commission is any evidence that this defendant was guilty of an act of negligence in connection with the injuries and death of her decedent. No attempt was made to introduce it in evidence. Had they attempted to refer to it in argument to the jury, they would have been instantly stopped, because the attempt would have been a clear effort to appeal to bias, prejudice and passion. The respect in which this Court is entitled to be held should preclude any attempt to make such an appeal to it.

#### IV.

**There Was no Evidence Tending to Establish a Duty on Defendant to give Special Warning to Tiller of the Back-up Movement on Slow-Siding.**

It is well settled that if by rule or custom a regular and recognized practice has been established in a yard, and if there is to be a departure from that practice so that some unprecedented and unexpected change in the manner of operations is to take place, special warning thereof must be given to those for whose benefit the rule has been promulgated, or the custom has come into existence. *Fernand v. Boston & M. R. Co.*, 62 F. (2d) 782; *C. & O. R. Co. v. Mihas*, 280 U. S. 102, 74 L. Ed. 207, 50 S. Ct. 42. Accordingly, before a person is entitled to a special warning, the evidence must show (1) that a movement was made which was violative of some rule or of an established custom, or, to express it differently, that the move was unprecedented and unexpected, and in addition thereto the evidence must show (2) that the injured person to whom no warning was given was a member of the class for whose benefit the rule was promulgated, or the custom established.

Petitioner made a great effort to show that by custom slow-siding north of switch point "B" was not used for back-up movements, or at least that locomotives pushing cars did not back along that track. She attempted to establish this alleged fact by asking an operator whether he had ever made such a movement, (e.g. R. 32, 71), or whether such a movement was a usual movement (e.g. R. 89). It was, however, conclusively brought out in evidence that each witness who had never made the movement or seen it made, had been in Clopton Yard only on relatively few occasions, and it was brought out from every witness who had had any reasonable amount of experience in the yard that "many times", (R. 97); "on a number of occasions" (R. 79); "time and again" (R. 131); "real often" (R. 177), an engine pushes cars ahead of it north into slow-siding.

At the bottom of Page 18 of her petition, petitioner makes the strange statement:

"A careful reading of the record will show that the evidence as to previous similar movements, the general use of the track which was a siding and its use for back-up movements for other purposes *was negligible.*" (Italics supplied).

In the statement of fact, we have referred to the specific page of the record where the testimony of each witness on this subject is to be found. Fortunately, that testimony cannot be contradicted by petitioner's unsupported statement. We vouch the record for our statement that each witness competent to testify concerning a custom, if any, in Clopton Yard, testified that back-up movements on slow-siding were matters of frequent occurrence, and that those who were not competent to testify of a custom because of their relatively slight experience in the yard, gave only negative testimony, i. e. that in the relatively few times they had been in the yard they had not seen this movement made.

Petitioner charges that: "The Circuit Court of Appeals has evidently confused the unusual movement doctrine with the doctrine which involves the violation of a rule, regula-

tion or custom established by the employer." (Brief, p. 19). The confusion is not with that Court, it is with petitioner. It is impossible to have an unusual, unexpected or unprecedented movement, unless it involves a departure from practice, established use, custom, rule or regulation. It is self-evident that departure from custom, presupposes the existence of custom.

Petitioner made no effort to show that such a custom, if it existed at all, existed for the benefit of men working in the yard, or, more specifically, that it existed in part for the benefit of an employee, the nature of whose work required that he make an effort to keep others from knowing where he was. This evidence shows that access could be gotten to the water tank at Clopton only by backing up slow-siding, or by backing down it. Railroads build tracks to be used not as ornaments. If such a custom had existed, it is much more reasonable to assume that it existed for the benefit of those using the public highway than that it existed for any other purpose. At any rate, if petitioner wished to rest on this point, there was upon her the burden of proof, yet she introduced and attempted to introduce not one scintilla of evidence on it. The decision of Mr. Justice Holmes in *C. & O. R. R. Co. v. Nixon*, 271 U. S. 218, 70 L. Ed. 915, 46 S. Ct. 495 is conclusive on this point.

While defendant knew that Tiller's duty called him to the yard, it had no way of knowing that he would be near slow-siding. It gave as it always gives, loud warning of the movement of the road engine, for the automatic bell was continuously ringing during the whole of the back-up movement.

## V.

**A General Verdict Cannot be Sustained if one or More of Several Issues have Erroneously been Submitted to the Jury.**

So the Circuit Court of Appeals held in strict conformity with the opinion of this Court handed down in *Wilmington*

*Star Mining Co. v. Fulton*, 205 U. S. 60, 51 L. Ed. 708, 27 S. Ct. 412, and in strict conformity with the other decisions cited in the opinion.

Petitioner says: "there is a decided conflict of authority upon the question" (Brief, p. 12). But there is no such conflict. So far as we have been able to ascertain in all cases that have come before a Circuit Court of Appeals (save those arising in Illinois where by analogy to a specific and peculiar provision of the Illinois Practice Act the contrary is held, and where the Federal Courts have felt compelled to follow the peculiar rule of Illinois) it has universally been held that if over objection, the trial court has erroneously permitted one or more matters to go to a jury, a general verdict cannot be upheld even though other questions were correctly submitted to the jury. The following cases are clear on this point, *Erie R. Co. v. Gallagher*, (2nd Cir.), 255 F. 814, 817; *Christian v. Boston*, (2nd Cir.) 109 F. (2d) 103, 105; *James Stewart & Co. v. Newby*, (4th Cir.) 266 F. 287, 291; *Travelers Insurance Co. v. Wilkes*, (5th Cir.) 76 F. (2d) 701, 705; *Buckeye Cotton Oil Co. v. Sloan*, (6th Cir.) 250 F. 712, 722.

Perhaps no court has better set forth the reasons for this rule than has the Eighth Circuit Court of Appeals in *Chicago St. P. M. & O. Ry. Co. v. Kroloff*, 217 F. 525, 528, wherein the Court said:

E

"A refusal by the Court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which plaintiff is seeking to recover is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict."

In the State of Illinois the contrary rule prevails. *Scott v. Parlin, et al.*, 245 Ill. 460, 92 N. E. 318. But as was said

by the Circuit Court of Appeals for the Seventh Circuit in *Chicago Rys. Co. v. Kramer*, 234 F. 245, 250, this peculiar rule of Illinois is based "on the analogy of Section 78 of the Illinois Practice Act".

The petitioner confuses two situations which are radically different. In the first situation two or more issues have been submitted to the jury, at least one of which is supported by no substantial evidence, and to the submission of that issue proper and timely objection has been taken. In such event the rule of *Wilmington Star Mining Co. v. Fulton*, *supra*, prevails. The other situation arises when two or more issues have been submitted to the jury, at least one of which is unsupported by substantial evidence, but no objection to the submission of that issue has been made, and the defendant has rested on a motion for a directed verdict. Since in the second situation there was an issue properly submitted to the jury the motion of defendant is, of course, to be denied. This is brought out very clearly by the Circuit Court of Appeals for the Ninth Circuit in *Southern Pac. Co. v. Kauffman*, 50 F. (2d) 159, 164, where it says:

"Appellant claims that the Court erroneously denied its motion for a directed verdict on the count charging negligence in the case of the wigwag signal. If this motion had been separably presented, it should have been granted (*Wilmington Star M. Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed. 708), but the motion was for a general verdict in favor of the defendant on all the counts and was properly denied if on any count or charge of negligence alleged the jury could find a verdict for the plaintiff under the evidence. The question was not raised by any other requested instruction."

The instant case does not present such a situation, for as is pointed out by the Circuit Court of Appeals, we not only moved at the end of the plaintiff's case and at the end of the whole case for a directed verdict upon a number of specific grounds, but we also moved that evidence in respect

to the Boiler Inspection Act be stricken (R. 204). In addition thereto we objected to the instruction of the Court, upon the ground that there was no evidence upon which the issue of an unexpected and unprecedented movement might be submitted to the jury (R. 191).

The only Federal case that we have been able to find which clearly takes position contrary to the rule announced by the Circuit Court of Appeals, is *Stephenson v. Grand Trunk Western R. Co.*, (7th Cir.) 110 F. (2d) 401. That was an appeal from the District Court of the United States for the Northern District of Illinois. The Court pointed out that the Illinois rule, as decided by the highest appellate court of Illinois, was contrary to the general rule as announced in the *Wilmington Star Mining Co.* case. It said on page 407, that the question involved "is one of practice or procedure, in which the statute or decision of the state court must be followed", and for this reason and for this reason alone, it did not follow the doctrine of the *Wilmington* case.

If the Seventh Circuit Court of Appeals was correct, and if this is a question of practice or procedure in which the state rule is to be followed, the question here becomes very easy of answer. For the rule in Virginia is clear. Its Supreme Court of Appeals, its highest court, has decided this question in exact accord with the opinion of the Circuit Court of Appeals in the instant case. *Craig-Giles I. Co. v. Wickline*, 126 Va. 223, 237, 101 S. E. 225.

With such an array of authority against her, and with such powerful reasons sustaining the rule, petitioner drew a long bow when she spoke of "a decided conflict of authority". If she were willing to make such a categorical statement it is passing strange that she could find nothing to support it. She says that this court has given tacit approval to her view because it denied certiorari in the two cases cited by her. Even if those two cases sustained her she overlooks the fact that a denial of certiorari by this court imports no expression of opinion by this court on the merits

of the case, *Hamilton Brown Shoe Co. v. Wolf*, *supra*; *A. C. L. R. Co. v. Powe*, 283 U. S. 401, 75 L. Ed. 1142, 51 S. Ct. 498.

The best that petitioner could find were two decisions of the Seventh Circuit Court of Appeals arising, in each instance, out of an appeal from a United States District Court in Illinois.

The first of these two cases is *Cross v. Ryan*, (7th Cir.) 124 F. (2d) 883. This was an action under an Illinois Statute to recover damages for the loss of a husband's and father's services due to intoxication. The complaint was in twelve counts and charged three causes of action. Each of the counts was held to state a good cause of action. Defendant had moved for judgment notwithstanding the verdict and, by a motion for a new trial, he questioned the sufficiency of the evidence to support the causes of action. The evidence was found sufficient. The Court does state that if any count is sustained by evidence, the general verdict must be upheld. It seems to be implicit in the opinion that this motion for a new trial was based on no particular issue or issues, but went to the whole case, as does a motion for a directed verdict. If this be true, the statement is in accord with general law. If, on the other hand, the motion for a new trial was based on the alleged lack of evidence to sustain certain points, then the statement was not in accord with the general law, but was in accord with the peculiar Illinois Law, to which the same Circuit Court of Appeals had decided, as hereinabove shown, it must adhere.

The other case cited by petitioner is *Miller v. Advance Transp. Co.*, (7th Cir.) 126 F. (2d) 442. That was an automobile accident case, wherein violation of the Illinois Highway Statute and acts of common law negligence were charged. Defendant raised the question of the sufficiency of the evidence to support the verdict. The Court found that there was evidence to sustain all charges of negligence. Here, also, the Court made the statement that if one charge was sustained, it must uphold the verdict. The comments

have made with reference to the preceding case are equally applicable here.

Accordingly, an examination of the authorities shows that there is no "decided conflict". The authorities are uniform, with the exception of a decision, and perhaps decisions, of the Seventh Circuit Court of Appeals, arising from appeals from the United States District Courts in Illinois, and that decision is predicated solely on a decision of the Illinois Court arrived at by virtue of an analogy to its statutory practice act and followed by the Circuit Court of Appeals only because it considers this matter to be one of practice and procedure, and, hence, that it is bound by the Illinois rule in cases arising in Illinois.

### CONCLUSION

We have dealt in this brief only with those points decided in our favor by the Circuit Court of Appeals, believing as stated at the beginning that they are the only questions involved at this stage of this procedure.

For the foregoing reasons, we submit that the petition should be denied.

THOMAS W. DAVIS,

Wilmington, N. C.

J. M. TOWNSEND,

Petersburg, Virginia

COLLINS DENNY, JR.,

Richmond, Virginia

CHARLES S. VALENTINE,

Richmond, Virginia

*Attorneys for defendant,*

ATLANTIC COAST LINE RAILROAD COMPANY

TILLER VS ATLANTIC COAST LINE RAILROAD

ROAD

South Richmond  
Stock Yard

RAILROAD

To Erie

CLOPTON

North

LEGEND

== Yard Track Movement  
- - - Movement of Train Stop

PLAT SHOW  
TRACK AND  
MOVEMENT  
CLOPTON Y  
Scale 1"=100'